

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER
OF
EDUCATION

HARMONY HILL SCHOOL AND
DEPARTMENT OF CHILDREN YOUTH AND FAMILIES

V.

CUMBERLAND SCHOOL COMMITTEE

DECISION

Held: The Cumberland School Department owes \$47,914.40 to Harmony Hill School pursuant to the determination of the Rhode Island Department of Elementary and Secondary Education that per pupil special education costs were to be calculated using a “FTE” methodology for the 2011-2012 fiscal year. The rulemaking procedures of the Administrative Procedures Act were not utilized in establishing the methodology for calculating per-pupil costs during the 2011-2012 fiscal year and so in failing to make payments as directed, Cumberland did not violate a rule or regulation.

DATE: June 29, 2012

Travel of the Case

On May 18, 2012 Harmony Hill School sought an expedited hearing regarding the Cumberland School Department's ("Cumberland") failure to pay the Harmony Hill School the special education per pupil cost that had been established by the Rhode Island Department of Education ("RIDE"). A hearing was convened on June 7, 2012 at which time the attorney representing the Department of Children, Youth and Families (DCYF) made a motion to add DCYF as a party, since it also sought to impose the contested per-pupil cost on the Cumberland School Department. Over Cumberland's objection, the motion was granted.

When the reasoning behind Cumberland's failure to pay the amount claimed by Harmony Hill (and now DCYF) became evident, the hearing officer determined that he had a conflict because of his attendance at a meeting at which certain matters involving DCYF were discussed. He immediately recused himself, and on June 18, 2012 the hearing was reconvened with the undersigned designated as hearing officer. In the interim, on June 12, 2012 DCYF's attorneys had filed an "Expedited Request for An Interim Order" to compel payment from Cumberland for the per-pupil special education rate published by RIDE on December 22, 2011. Since there was no objection by any of the parties, DCYF's request was consolidated for hearing with the pending appeal of Harmony Hill School (in which DCYF had already joined). Further testimony was then taken and the record in this matter closed upon receipt of the transcript on June 22, 2012.

Decision in this matter has been expedited because of the financial impact this dispute has had on the operations of the Harmony Hill School, as attested to by its CEO at the June 18, 2012 hearing.

Findings of Fact:

- For the past several years, RIDE has annually determined a per-pupil special education cost which each Rhode Island school district must pay for the education of local children placed at residential facilities by DCYF. Historically, RIDE's Director of the Office of Special Education (now called the "Office of Student, Community and Academic Supports") has issued an annual memo listing all districts and their respective per-pupil costs. Tr. Vol. I, pp. 15-19. For at least the last six (6) years, the per-pupil cost has been determined using a "full time equivalent" methodology. Tr. Vol. I, pp.18, 43;

- After considerable discussion and analysis, RIDE determined that the methodology for determining per-pupil special education costs would change from a “full time equivalent” or “FTE” method to a head count or “census count” method. On October 5, 2011 the Director of the Office of Student, Community and Academic Supports, J. David Sienko, issued a memo to all Special Education Directors and Business Managers notifying them of the change in methodology for calculating each community’s special education average per pupil cost. The memo had an attached chart showing the amount of each district’s per pupil cost which also constituted the “rate” they were required to contribute to the educational costs of students who were in the care of DCYF. Joint Ex. 1; Tr. Vol. I, pp. 14, 20-25; 45-52; Vol. II, p. 22.
- Upon her receipt of Mr. Sienko’s memo, the Director of Special Education for Cumberland adjusted the amount that she had budgeted for payments for Cumberland students placed in residential facilities by DCYF. Tr. Vol. II, pp. 47, 50.¹
- At some point after the October 5, 2011 memo was issued, DCYF contacted Carolyn Dias, Chief of the Office of Fiscal Integrity and Efficiencies, to set up a meeting. Two meetings were then held to discuss the reasons for the change in methodology, the impact the change would have on DCYF’s budget, and the fact that there had not been a “full conversation” with DCYF about making the change prior to its being made. Tr. Vol. I, pp. 56-58, Vol. II, p.17.
- RIDE determined that the “census count” methodology was a “more appropriate method” and a “more accurate representation” of per-pupil special education costs (Tr. Vol. II pp. 24-25, 34) but a decision was made to transition to the census count method over a period of time rather than implement this methodology for fiscal year 2011-2012. Tr. Vol. II, pp.25-28.²
- On December 22, 2011 Carolyn Dias, Chief of RIDE’s Office of Fiscal Integrity and Efficiencies, issued a memo to Special Education Directors and Business Managers. The memo referenced an October “letter from RIDE concerning the Special Education per pupil” and indicated that the memo provided “updated information with respect to both reporting and payments”. Joint Ex. 2; The memo further indicated that while per pupil expenditures would be reported using the June 30th Census count:

¹ Dr. Beaudoin-Colwell testified that there was a “huge change” in the amount that Cumberland was expected to contribute to the cost of educating children in DCYF care (through implementation of the “census count” methodology). Tr. Vol. II, pp.46-47.

² The record reflects that funding from the General Assembly has been secured to address the anticipated impact to DCYF’s budget in a transition to a census count methodology for determining per-pupil special education costs. Tr. Vol. II, pp. 36-37.

... at this time **payments** under Section 16-64-1.1(c), 16-64-1.2 and 16-64-1.3 of the RIGL will be calculated using the FTE methodology. Joint Ex. 2.

- When she received the December 22, 2011 memo, Cumberland’s Director of Special Education, Dr. Lisa Beaudoin-Colwell, noted the “significant difference” in the per-pupil cost that Cumberland would now be obligated to pay. She testified that she was “very confused as to how we went from the October memo to the December memo” and was not sure of which memo constituted a “directive”. She then sought advice from Cumberland’s legal counsel. Tr. Vol. II, pp. 51-52.
- Cumberland has, to date, continued to pay the daily per-pupil cost indicated in the October 5, 2011 memo from Mr. Sienko. Tr. Vol. II, pp.58-59.
- Although the placement of students at Harmony Hill School is not presently “in danger” because of Cumberland’s failure to pay the per-pupil cost or “rate” as determined by the “FTE” methodology, reduced cash flow has jeopardized overall operations and the school may have to implement staff layoffs. Tr. Vol. II, pp.77, 108-109.

Positions of the Parties:

Harmony Hill School

Counsel for Harmony Hill School argues that Cumberland has been making direct payments to it over the course of the fiscal year, but at the lower per-pupil rate. Direct payment to the “facility providing educational services” is an alternative permitted by the statute and this is the method Cumberland has utilized. Under such circumstances, Harmony Hill is directly impacted by the reduced level of payments and has legal standing to make this appeal for additional payment before the Commissioner. Cumberland has been paying \$40.94 per day on the basis of the “census count” methodology even after the \$123.90 per day “FTE” rate was established by the December 22, 2011 memo of Carolyn Dias. It is undisputed that this has resulted in an amount of \$47,914.40 being owed by Cumberland to Harmony Hill School. Immediate payment must be made in order to address the serious cash flow problem that has resulted and to avert the staff layoffs that are currently contemplated. If Cumberland does not pay this amount, then DCYF must do so.

Counsel notes that arguments about conflicting memos and confusion notwithstanding, it is actually the October memo that effectuated a complete change to the methodology by which the cost of educating children in state care have been allocated between DCYF and local school districts. Harmony

Hill requests that the “FTE” methodology and rates be sustained, as re-established in the December memo of Ms. Dias, and that the Cumberland School Department pay this amount to Harmony Hill directly or to DCYF, as soon as possible.

DCYF

Counsel for DCYF emphasizes that RIDE has the necessary authority to set the rates and clearly exercised this authority when it issued the December 22, 2011 memorandum. Ms. Dias is clearly at a higher level of responsibility within RIDE than Mr. Sienko, such that her December 22, 2011 took precedence over his October 5, 2011 communication on the same subject. The December 22, 2011 memo indicated that “updated information” was being provided on per-pupil special education costs for which districts would be responsible during the 2011-2012 fiscal year. The attachment to the December 22, 2011 memo listed the specific amounts that had been re-calculated using the “FTE” methodology, with the expectation that all districts, including Cumberland, would immediately comply.

Counsel for DCYF argues that Cumberland could have easily dispelled its confusion and sorted out any conflicting information by a call to appropriate RIDE staff. Instead, Cumberland did nothing to obtain clarification and maintained its payments to Harmony Hill School at the lower rate. This has aggrieved both Harmony Hill School and DCYF, which is ultimately responsible for the cost of placing these children residential facilities.

Although Cumberland contends that it relied on the rates set forth in the October 5, 2011 of David Sienko and proceeded to make adjustments (reductions) to various line items in its school budget, there has been no demonstration by Cumberland that it relied on the October rates to its detriment. DCYF argues implicitly that there is no equitable estoppel argument that could be advanced on the theory of detrimental reliance on the information contained in Mr. Sienko’s October 5, 2011 memo.

In terms of a requested remedy, DCYF argues that monies owed by Cumberland, at this point almost \$48,000.00, should be withheld by order of the Commissioner to the General Treasurer. The basis for the withholding of funds under R.I.G.L. 16-5-30 is that Cumberland has willfully violated a rule promulgated by RIDE that is designed to ensure that appropriate educational services are provided to children who are in DCYF care. In the alternative, DCYF requests that the Commissioner enter an interim protective order to compel Cumberland to make payment of the amount due for five children who are, or have been at some point during this fiscal year, placed at Harmony Hill School.

Cumberland School Committee

Through counsel, Cumberland initially points out that it was DCYF's adverse reaction to the new methodology for calculating per-pupil special education costs that clearly resulted in a change to the rates that had been published on October 5, 2011. This, the district contends, is not a principled reason for an administrative agency such as RIDE to take action. Cumberland reasonably relied on the memo traditionally circulated by the person who occupied Mr. Sienko's position at RIDE and its welcomed announcement that the census count methodology that had been under discussion was actually being implemented for the 2012 fiscal year. Budgets were adjusted according to the lower rate for Cumberland that was set forth in the October 5, 2011 memo. Although it is understandable that DCYF reacted adversely to the impact the new methodology had on its fiscal year 2012 budget, once RIDE had set the "annual" rates for per-pupil special education costs in October, this foreclosed any discussion of altered rates for which districts would become responsible in 2011-2012.

Counsel argues that in the absence of any rulemaking under the Administrative Procedures Act, it was inappropriate to return to the "FTE" methodology after all special education directors and business managers had received notice that the new methodology had been adopted and district staff proceeded to make the budgetary adjustments that reflected the more favorable rates. While reduced financial obligations were easily integrated into school budgets, absorption of increased rates almost six months into the 2012 fiscal year was problematic. Thus, Cumberland argues that the rates set earlier in the fiscal year by Mr. Sienko's October 5, 2011 memo must be binding upon RIDE and all members of the educational community.

As to the request that funds be withheld from Cumberland's state education aid, counsel argues that this is not warranted because Cumberland has not acted in violation of a law or regulation. Rather, Cumberland has continued in good faith to make payments according to the rate of which the district received notice in the traditional fashion and at the customary time. When conflicting information was provided to its Special Education Director almost three (3) months after the initial notification, Cumberland followed up with its attorneys in order to determine how it should respond. If the interpretation and decision of the Commissioner is that the December 22, 2011 memo controls, then Cumberland will accept this ruling.

DECISION

It is our finding that RIDE has the authority to determine the amount of the “per-pupil special education cost” for districts that are required to contribute to the cost of educating children placed by DCYF in residential facilities. The authority to determine “per-pupil cost” is not explicitly set forth in law, but it is implicit in the statutory language found in R.I.G.L. 16-64-1.1, 16-64-1.2 and 16-64-1.3³ and further supported by the broad regulatory authority conferred upon the Board of Regents by R.I.G.L. 16-24-2 “Regulations of state board” (particularly subsection (3)) and 16-24-3 “Annual census of children with disabilities”. In making its determination of “per-pupil cost” for the administration of “educational programs operated and/or supported by...the department of children, youth, and families”⁴, RIDE evidently has determined that there are very good reasons to change from an “FTE” to a “Census Count” methodology so that, inter alia, per-pupil cost will be more accurate. When RIDE decided to implement this change for the 2012 fiscal year and later reversed itself, both the methodology and RIDE’s procedures for implementation became the subject of controversy. In its appeal, Cumberland takes issue with the procedures followed in RIDE’s decision to return to an “FTE” methodology for calculating per pupil cost. This decision caused its per-pupil rate to increase from \$14,985.00 to \$45,347.00. Cumberland has continued to pay the lower “rate” to Harmony Hill School pending resolution of this controversy.

We find that the rates calculated according to the “FTE” methodology are binding on the Cumberland School Department. The explanation for this conclusion is necessarily condensed by the need to expedite this decision.

The argument that Cumberland raises with respect to RIDE’s failure to follow the APA’s rulemaking procedures in re-establishing the “FTE” methodology in late December applies with equal force to the implementation of the “Census Count” methodology earlier in the same year. If the “FTE” methodology is potentially invalidated on the basis of APA noncompliance, then the “Census Count”

³ These sections of the General Laws put in place a statutory scheme for the payment and reimbursement for educational costs of children placed in foster care, group homes, or other residential facilities. In addition to financial responsibility, these sections also describe the educational responsibility for such students.

⁴ There appear to be some grammatical shortcomings in the first paragraph of R.I.G.L. 16-24-2, but the language of this paragraph makes sense only when the educational programs operated and/or supported by DCYF are placed on a par with educational programs operated by the department of mental health, retardation, and hospitals, human services and corrections. Our interpretation is that the educational programs of all of the listed agencies are subject to regulation by the “state board of regents for elementary and secondary education”.

methodology is even more vulnerable. The evidence here is that the “FTE” method has been in use for a very long time. RIDE witnesses knowledgeable about this program could not recall a time when any other methodology was utilized. From an historical standpoint, reversion to the “FTE” methodology on December 22, 2011 constituted return to a de facto “rule” of longstanding validity.

Even if RIDE’s adoption of the “FTE” methodology does constitute rulemaking,⁵ the APA supports its enforcement even in the absence of rulemaking procedures. Testimony in this matter confirmed that the “FTE” methodology has been in effect for at least the last six (6) years. Under R.I.G.L. 42-35-3(c) a rule may not be contested on the basis of noncompliance with procedural requirements after it has been in effect for two (2) years. This would make Cumberland subject to such a “rule” absent demonstration of “prejudice”. There is no evidence of prejudice to Cumberland because of RIDE’s alleged failure to comply with rulemaking procedures. In fact, Cumberland seeks to recognize the benefit of the less formal procedures RIDE used by means of its October 5, 2011 memo to lower the amount of its per-pupil payments for fiscal year 2012.

Cumberland was understandably caught by surprise when its “per-pupil cost” was reset in late December. The Director of Special Education testified that she had adjusted line items of the school budget when she received the October 5, 2011 memo. Her adjustment of line items of the budget, in and of itself, does not demonstrate prejudice or constitute proof that Cumberland relied on the October 5, 2011 information to its detriment.

Cumberland submits that RIDE’s communications on fiscal 2012 per pupil rates were conflicting and confusing. Implicit in this argument is that Cumberland is not obliged to make additional payments until a hearing officer resolves this conflict. The October 5, 2011 communication from J. David Sienko was quite clear. The previous RIDE staff member in Mr. Sienko’s position had historically notified districts at this time of year of “per-pupil costs” for children in DCYF placements. Mr. Sienko’s memo clearly conveyed the information that the rates reflected a “Census Count” and not FTE’s and that the figures on the attachment were the amounts that each district would be required to contribute to the program(s) during the 2011-2012 school year. Cumberland’s Director of Special Education testified that she was confounded by a communication from Carolyn Dias, Chief of RIDE’s Office of Fiscal Integrity

⁵ It is not necessary in this appeal, and we decline to decide, the issue of whether RIDE’s publishing of “per-pupil costs” or rates for purposes of calculating district contributions to the educational costs of students placed in residential facilities by DCYF constitutes a “rule” or “regulation” to which the rulemaking procedures of the APA apply.

and Efficiencies, when she received it in late December of that same year. It was a memo on the subject of per-pupil costs.

Ms. Dias' memo is not a model of clarity. It provides no explanation as to why a second communication on the subject of per-pupil costs was being issued by a different RIDE official nor does it specifically mention Mr. Sienko's prior memo or indicate that the information in her memo supersedes any previously provided information. However, the December 22, 2011 memo does make reference to an "October letter from RIDE" and indicates that "updated information" was being provided. Ms. Dias' communication is inaccurate in this respect in that it actually conveyed very different information with, in some cases, substantial changes to districts' per-pupil costs. No explanation or reasons for the changed methodology was provided to the special education directors and business managers to whom the memo was sent.

The second memo was in conflict with Mr. Sienko's earlier communication to districts in that it failed to specifically mention his earlier memo, to acknowledge that different information was actually being provided or to explain the reason(s) for the change. However, the second memo also provided names and contact information in the event that the recipients had questions. If special education directors or business managers did not understand what their contributions for "DCYF" students were to be in fiscal year 2012, named RIDE staff were clearly accessible to answer their questions. The memo was sufficiently clear on communicating changes to per-pupil costs to have warranted further inquiry by school district staff, including those in Cumberland, who may have been uncertain as to the payments required of them.

Finally, Cumberland contends that DCYF's reaction to the implementation of the "Census Count" methodology caused RIDE, inappropriately, to defer to DCYF and return to the "FTE" methodology for fiscal year 2012. The record in this case documents that DCYF had substantive concerns about the new methodology and the impact it had on DCYF's budget. DCYF administrators also raised issues of insufficient notice and opportunity to plan for these increased costs. These concerns were discussed at two meetings between representatives of RIDE and DCYF. Data on the impact to DCYF's budget and district budgets were collected and studied. On the basis of the record in this case, we find that RIDE's reaction to DCYF's concerns was both reasonable and deliberative. Consideration of the need to carefully balance the interests of districts and DCYF, give appropriate notice and opportunity for input, and plan for the funding DCYF would need to transition to the new methodology supported RIDE's ultimate decision. The decision to return to the original methodology and seek

funding for the transition to a new “Census Count” methodology has been shown to be both reasonable and fair.

There is no proof in this case that Cumberland violated a rule or regulation, as DCYF contends. In determining per-pupil costs and notifying districts of required payments, RIDE did not formally promulgate a rule or regulation. Therefore, there is no basis on which to withhold monies from Cumberland’s state education aid; however, we direct Cumberland to pay the monies owed (according to the per-pupil cost listed on the December 22, 2011 memo from RIDE) for students placed at Harmony Hill School during fiscal year 2012 within five (5) days of this decision.

The appeal of Harmony Hill School and DCYF is sustained.

DCYF’s separate request for an interim protective order to compel such payment is hereby denied at this time, but if payment is not made to Harmony Hill School within five (5) days, upon notice from any of the parties, we will reconvene the hearing to determine if an interim protective order is needed. Harmony Hill School has demonstrated great patience in waiting for this matter to be resolved.

For the Commissioner,

Kathleen S. Murray
Hearing Officer

Deborah A. Gist
Commissioner

DATE: June 29, 2012